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No. 98-98

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,

PETITIONERS,

-vs-

BERNARD SMITH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

GALEN H. WILKES
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONERS

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STATEMENT OF THE CASE

Petitioners stand by the statement of the case as set forth in the petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

Smith argues that this Court should deny certiorari review because: (1) Judge Bradshaw's determination that even with the proffered mitigation evidence Smith would have received a death sentence was a mixed question of law and fact, and therefore not entitled to the presumption of correctness under 28 U.S.C. § 2254(d)(8); and (2) the Ninth Circuit Court of Appeals applied the proper standard of prejudice in holding Smith was entitled to a new sentencing.

Judge Bradshaw's decision that the proffered mitigation evidence would not have changed Smith's sentence was entitled to the presumption of correctness under 28 U.S.C. § 2254(d)(8) because, whether the proffered mitigation evidence would have resulted in a life sentence rested on a factual determination and not the application of facts to a principle of law. Finally, the Ninth Circuit did not require Smith to show that his sentence would have been different had the proffered mitigation evidence been presented and thereby failed to follow the prejudice requirement for finding ineffectiveness of counsel as required by *Lockart v. Fretwell*, 506 U.S. 364, 369 (1993) and *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE STATE TRIAL JUDGE—WHO WOULD HAVE RESENTENCED SMITH IN THE EVENT A RESENTENCING HAD BEEN ORDERED—THAT THE PROFFERED MITIGATION EVIDENCE WOULD NOT HAVE CHANGED SMITH'S DEATH SENTENCE RESTED ON FACTUAL DETERMINATIONS AND NOT THE APPLICATION OF FACTS TO A PRINCIPLE OF LAW AND THEREFORE WAS ENTITLED TO A PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. 2254(D)(8).

In his post-conviction hearing, Smith argued he was entitled to a new sentencing because his trial counsel was ineffective. For Smith to obtain a resentencing on the grounds of ineffective assistance of counsel, he had to demonstrate prejudice. *Strickland*, 466 U.S. at 687; *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (defendant unable to show prejudice when attorney chose not to call witnesses). Smith had to show that, if his trial counsel had presented the proffered mitigation evidence, his sentence would have been life instead of death.

Judge Bradshaw conducted a 4-day evidentiary hearing to determine whether Smith was entitled to a new sentencing on the grounds his trial counsel was ineffective by failing to present mitigation evidence.[1] During the evidentiary hearing, Smith called witnesses—both expert and lay—who testified regarding the areas of mitigation that Smith claimed his trial counsel was remiss in failing to present at his sentencing. After observing these witnesses testify, Judge Bradshaw concluded that, even if this evidence had been presented at Smith's sentencing hearing, the sentence still would have been death. (Appendix C, at 2–4.) In effect, Smith was given a new sentencing hearing before Judge Bradshaw, who would have resentenced Smith, in the event a resentencing had been ordered. *See* Rule 32.4(e) of the Arizona Rules of Criminal Procedure; *Gerlaugh*, 129

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1. Smith also asserted his trial counsel was ineffective at the guilt phase. (Appendix A, at 16–18.) This claim was rejected by the Ninth Circuit Court of Appeals. (*Id.*)

F.3d at 1036; *State ex rel Corbin v. Superior Court*, 675 P.2d 1319, 1322 (Ariz. 1984).

Judge Bradshaw's finding was a factual determination because the outcome depended on the credibility of the witnesses Smith presented to establish the existence of mitigating evidence justifying a life as opposed to a death sentence. Issues whose determination hinge on questions of credibility of witnesses as opposed to applying facts to legal principles are considered historical facts, which are entitled to presumptions of correctness under 28 U.S.C. § 2254(d)(8). *Thompson v. Keohane*, ___ U.S. ___, 116 S. Ct. 457, 465 (1995). Therefore, Judge Bradshaw's determination should have been afforded the presumption of correctness under 28 U.S.C. § 2254 (d)(8). *See Gerlaugh*, 129 F.3d at 1036. (court of appeals refused to remand the matter back to the state court for resentencing after post-conviction judge, who was also the trial and sentencing judge, concluded the new mitigation evidence would not have changed the sentence he imposed.).

Respondents disagree with Smith's contention that the trial court used an improper legal standard in determining whether sufficient mitigation was presented to warrant a life sentence. Smith argues that the trial court improperly rejected his proffered mitigation evidence of anti-social personality and long term drug use because the trial court concluded they did not impair Smith's ability to conform his conduct to law and therefore could not be considered as mitigation under A.R.S. § 13–703(G)(1). First, the Arizona Supreme Court, in rejecting the claim that a defendant's prior substance abuse did not present sufficient mitigation to vitiate the imposition of the death penalty, has used language similar to that employed by Judge Bradshaw. *See e.g. State v. Murray*, 906 P.2d 542, 576 (Ariz. 1995) (defendant "failed to show alcohol or illicit drugs impaired his ability to appreciate wrongfulness or conform his behavior to the requirements of the law").

Second, when imposing a death sentence, the trial judges are "are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). Third, while the Constitution demands that the sentencer consider the proffered mitigation, the Constitution does not compel the sentencer to view the mitigation the way the defendant wants it to be viewed, or to give it the weight the defendant believes it should be accorded. *Eddings v. Oklahoma*, 455 U.S. 104, 114–15, 117 (1982).

Here, as noted by Judge Broomfield, Judge Bradshaw obviously considered the fact that Smith had an anti-social personality:

> At the post-conviction hearing, Dr. Simonis and Dr. Bendheim agreed that Petitioner had an anti-social personality disorder. Both stated that a person with such a disorder is able to distinguish right from wrong but often wilfully decides to do wrong out of self-interest.[2]

(Appendix B, at 7.)

Moreover, courts are not required to find that an anti-social personality constitutes mitigation, thereby mandating the imposition of life as opposed to a death sentence. *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988); *Gerlaugh*, 129 F.3d at 1034, citing *State v. Richmond*, 560 P.2d 41, 52–53 (Ariz. 1976) (mere character or personality disorder like sociopathy is not alone sufficient to constitute a mitigating circumstance). Judge Bradshaw also considered Smith's "extensive use of drugs." (Appendix C, at 1.) *See State v. Bible*, 858 P.2d 1152, 1212 (Ariz. 1993) (We do not believe that defendant's habitual drug use is of any value as mitigation in this case, given the fact that there was no evidence it significantly impaired his capacity to control his conduct on the day in question.). Thus, Judge Bradshaw considered Smith's anti-social

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2. Judge Broomfield also rejected Smith's argument that his anti-social personality disorder constituted mitigation warranting a life sentence:

> The doctors' testimony at the post-conviction hearings established that Petitioner has an anti-social personality disorder. However, both doctors also testified that a person with such a disorder is able to distinguish right from wrong but often *wilfully decides to do wrong out of self-interest. Such evidence has very little or no mitigation value*. In addition, the state court found that Petitioner had no "mental impairment" at the time of the offense.

(Appendix B, at 10; emphasis added.)

personality and long term drug use, but concluded that these factors, along with the other areas of proffered mitigation, did not warrant a life sentence.

The Ninth Circuit Court of Appeals failed to afford Judge Bradshaw's factual determination—that even with the proffered mitigation evidence Smith would have received a death sentence—the presumption of correctness due it under 28 U.S.C. § 2254(d)(8). The court's failure to follow the presumption of correctness doctrine added years to the process and undermined the finality of the State's judgment.

II

BECAUSE THE NINTH CIRCUIT COURT OF APPEALS DID NOT FIND THAT THE PROFFERED MITIGATION EVIDENCE WOULD LIKELY RESULT IN A LIFE RATHER THAN DEATH SENTENCE, THE COURT FAILED TO FOLLOW THE PREJUDICE STANDARD OF *STRICKLAND V. WASHINGTON.*

Petitioners disagree with Smith's argument that the Ninth Circuit applied the proper prejudice standard in granting Smith a new sentencing. The Ninth Circuit did not require, nor did Smith show, that the proffered mitigation evidence would have resulted in a life as opposed to a death sentence. In order to obtain relief on the basis of ineffective assistance of counsel, the defendant must show the ineffectiveness of his counsel and resulting prejudice. *Strickland*, 466 U.S. at 686. To establish prejudice, the defendant must show that the result would have been different. *Darden v. Wainwright*, 477 U.S. 168, 184 (1986).

Both Judge Bradshaw and Judge Broomfield concluded that Smith did not show that his sentence would have been other than death even if the proffered mitigation evidence had been presented. (Appendix B, at 9–11; Appendix C, at 2–4.) Despite the above findings and the Ninth Circuit Court's conclusion that the proffered mitigation evidence "did not demand a life sentence rather than a sentence of death," the court still granted Smith a new sentencing. (Appendix A, at 12.)

Finally, Judge Bradshaw, who had the opportunity to observe and evaluate the witnesses Smith called for the purpose of establishing mitigation, concluded that even if the proffered mitigation evidence had been presented, the sentence would have been the same. (Exhibit C,

at 2–4.) Judge Bradshaw is the person who would have resentenced Smith had the newly-presented evidence of mitigation been deemed to be significant. Judge Bradshaw had only two choices: a life or death sentence. He alone had to make that decision. Thus, Judge Bradshaw's ruling that the death sentence would have been imposed even if the evidence had been presented is dispositive under *Strickland* and under any other prejudice standard.

Thus, the Ninth Circuit disregarded the prejudice standard of *Strickland* and its progeny by not requiring Smith to demonstrate that his sentence would have been life had the proffered mitigation evidence been presented.

CONCLUSION

Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

GALEN H. WILKES
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONERS

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